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No. 82-1413

IN THE

Supreme Court of the United States

October Term, 1982

GLORIA WOLKENSTEIN, KATHRYN SILKES, PHILIP RUMORE and VINCENT NOLA, Individually and on Behalf of all Others Similarly Situated,

Petitioners,

vs.

EUGENE T. REVILLE, Individually and as Superintendent of Schools; CLAUDE D. CLAPP, Individually and as Chief Fiscal Officer of the City of Buffalo Public School System; FLORENCE E. BAUGH; DAVID KELLY; JOSEPH E. MURPHY; LOUIS C. BENTON; JOSEPH D. HILLERY; MOZELLA RICHARDSON; DENNIS BULERA; OSCAR SMUCKLER and JOHN C. FIORELLA, Individually and as Members of the BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF BUFFALO,

Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Issue

Should this Court grant the instant Petition for Writ of Certiorari, in order to consider whether §210, *et seq.* of the New York State Civil Service Law is constitutional because all "Chief Executive Officers", defined by that statutory scheme, necessarily have such a personal, pecuniary interest in the outcome of proceedings required thereunder that the determinations which must be made by those Chief Executive Officers are inherently biased and thus run afoul of constitutional due-process considerations enunciated in such cases as *Tumey v. Ohio*, 273 US 510, *et al.*

The Petitioners' arguments in favor of granting the Petition were considered at length by the Courts below and both Courts rejected them in their entirety. (See Petition—Appendix A1-A52.)

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Statement in Response

On February 16, 1983, a Petition for Writ of Certiorari in the above-entitled case was filed in this Court, seeking review of an order issued by the United States Court of Appeals for the Second Circuit on behalf of certain named public school teachers (hereinafter referred to as the "Petitioners").

Thereafter on April 14, 1983 the Clerk of this Court requested that a Response be filed on behalf of Eugene T. Reville and named members of the Board of Education of the City School District of the City of Buffalo, New York (hereinafter referred to as the "Board").

This Response is made in accordance with Rule 33 of the Rules of the Supreme Court, and its purpose is to set forth the reasons the instant Petition should be denied.

The Board opposes the granting of this Petition for the following reasons:

(1) This Court has previously determined that §210, *et seq.* of the New York State Civil Service Law is constitutional in *Sanford v. Rockefeller,* 32 NY 788, vac. and rem. 416 US 77, aff'd. 35 NY2d 547, appeal dismissed 421 US 973.

(2) This Court has specifically refused to entertain this precise issue in *Kornit v. Board of Education,* remanded for lack of subject matter jurisdiction 542 F2d 593 (2nd Cir. 1976), remanded for further consideration 438 US 902, aff'd. 591 F2d 1330 (2nd Cir. 1978), cert. denied 440 US 936 (1979).

(3) The Courts below, in rejecting Petitioners' contentions, properly found significant legal and factual factors distinguishing a Chief Executive Officer's legal responsibilities under §210, *et seq.* of the New York State Civil Ser-

vice Law from the authorities relied upon by the Petitioners to justify and indeed require rejection of Petitioners' contentions.

(4) *Assuming arguendo*, that this Court might consider the actual conduct of Superintendent Reville in the discharge of his duties pursuant to §210, *et seq.* of the New York State Civil Service Law:

(a) There is no pleading on behalf of the Petitioners that Reville was actually biased in making any determination pursuant to §210, *et seq.* of the New York State Civil Service Law;

(b) If, in fact, there was actual bias by Reville, adequate judicial review was available to remedy such conduct; and

(c) There was, *in fact*, no proof adduced that Reville was *actually* biased.

For all of these reasons, as more fully set forth in the Argument below, the instant Petition should be dismissed.

Argument

It should be noted, at the outset, that the provisions of the Civil Service Law, §210 have been the subject of considerable litigation and intensive judicial scrutiny within the past ten years. In all cases, involving among them a wide variety of constitutional arguments, the conformity of the statute and its procedure with constitutional principles have been recognized (*e.g., Matter of Lawson v. Board of Education*, 35 AD2d 878, appeal dismissed 28 NY2d 993, cert. denied 404 US 907 [1970]; *Matter of Sanford v. Rockefeller*, 40 AD2d 82, affd. 35 NY2d 547, appeal dismissed 421 US 973, 95 S Ct 1972, 44 L ed 2d 465 [1975]; *Matter of Kiernan v. Bronstein*, 73 Misc 2d 629 [Sup Ct, New York Co. 1973]).

The precise issue of bias was first raised in an action in the United States District Court, Eastern District of New York, in 1975 (*Harvey J. Kornit v. Board of Education, Plainview-Old Bethpage School District, New York*, 75-C-518). A memorandum and order (unreported) was issued by District Judge ORRIN G. JUDD, granting the defendant's motion to dismiss the complaint. A copy is annexed hereto as Appendix I. The Plaintiff then appealed to the United States Court of Appeals for the Second Circuit.

Without commenting on the substance of the District Court's decision, the Circuit Court vacated the judgment and remanded the action with instructions to dismiss for lack of subject matter jurisdiction (542 F2d 593 [1976]) on the ground that the school board was not a "person" for purposes of 42 USC §1983, citing *Monroe v. Pape*, 365 US 167 (1961) and its own recent decision in *Monell v. Dept. of Social Services*, 532 F2d 259 (1976). Plaintiff filed a petition for certiorari in the United States Supreme Court, which granted the writ, vacated the judgment appealed from and remanded the case to the Circuit Court for reconsideration (438 US 902 [1978]) in the light of the Supreme Court's decision in *Monell v. Dept. of Social Services, supra*, 436 US 658 (1978).

Upon reconsideration, the Circuit Court vacated its earlier judgment in this matter, and affirmed the judgment of the District Court, dismissing the complaint, for the reasons stated by the late Judge Judd (591 F2d 1330 [10/4/78]). A petition to the Supreme Court for certiorari of the reconsidered judgment was denied (440 US 936 [1979]) and a request for rehearing was denied (441 US 917 [1979]). Thus, in this somewhat circuitous fashion, this Court has upheld the constitutionality of the Taylor Law's penalty procedure against a charge of bias in the Chief Executive Officer.

Subsequently, based upon the holdings in *Sanford* and *Kornit*, the same result was reached in *Starrs v. Bock*, 77-C-5435 (SDNY Dec. 21, 1978), 12 PERB 7501; *Tepper v. Galloway*, 481 F Supp 1211 (EDNY, 1979); and *O'Brien v. Bd. of Education*, 498 F Supp 1033 (SDNY, 1980).

Petitioners rely, for their argument as to pecuniary interest, on *Gibson v. Berryhill*, 411 US 564, 93 S Ct 1689 (1973); *Ward v. Village of Monroeville, Ohio*, 409 US 57, 93 S Ct 80 (1972); and *Tumey v. Ohio, supra*. The cases are inapposite, we submit, separately and in tandem.

First, in *Ward v. Monroeville*, the Mayor of the Village was responsible for adjudicating and levying fines in matters which were criminal in nature (*cf., Tumey v. Ohio*, 273 US 510, 523 [1927]). Although it appears that the Mayor did not receive directly any part of the fines levied (as in *Tumey, supra*), his overall responsibility for village finances was viewed as inherently prejudicial in criminal matters.

Gibson v. Berryhill, on the other hand, involved clearly administrative determinations, but the potential for personal profit by the members of the Board of Optometry (all private citizens and practicing optometrists) was inescapable.

In the case at bar, the determinations at issue are civil and administrative, not criminal, and do not result in direct, personal profit to the Superintendent. Thus, we submit, the direct opportunity for personal profit in an administrative decision, as found in *Gibson*, does not exist here. Where the likelihood of personal gain is as remote and tenuous as it is here, it would be entirely unreasonable to conclude that a responsible public office

would be inherently biased (*Hortonville Joint School Dist. v. Hortonville Education Assn.*, 426 US 482 [1976]).

In *Hortonville*, the United States Supreme Court, reversing an order of the Wisconsin Supreme Court, held that the involvement of a Board of Education with its teachers during the course of a long and bitter strike did not prevent the Board from making a determination, after a hearing, which resulted in the dismissal of the striking teachers; that Wisconsin law placed the responsibility for such decision on the Board rather than on some "impartial" adjudicator; and that the Board's determination could be attacked on due process grounds *only* if it could be shown that the Board *could not* act consistently with due process (426 US 482, 494). The Chief Justice, writing for the majority, said (pp. 496-497):

> "Respondents have failed to demonstrate that the decision to terminate their employment was infested by the sort of bias that we have held to disqualify other decisionmakers as a matter of federal due process. A showing that the Board was 'involved' in the events preceding this decision, in light of the important interest in leaving with the Board the power given by the state legislature, is not enough to overcome the presumption of honesty and integrity in policymakers with decisionmaking power . . ."

Finally, since the Petitioners, who represent approximately 3,000 striking public school teachers, are unable to allege, let alone prove, one instance of *actual* bias on the part of Superintendent Reville, this Petition is without merit.

Conclusion

The petition should be denied.

Respectfully submitted,

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APPENDIX I

Memorandum and Order of the United States District Court, Eastern District of New York

UNITED STATES DISTRICT COURT
Eastern District of New York

75-C-518
July 22, 1975

HARVEY S. KORNIT,

Plaintiff,

v.

BOARD OF EDUCATION, PLAINVIEW-OLD BETHPAGE SCHOOL DISTRICT, NEW YORK,

Defendant.

Appearances:

HARVEY S. KORNIT, *pro se. Plaintiff*

JOSEPH W. CAMPANELLA, ESQ.
Attorney for Defendant

JUDD, *J.*

Defendant has moved to dismiss this civil rights action for improper service and for failure to state a valid claim.

Facts

Plaintiff, a social studies teacher employed by defendant Board of Education, sues to recover $379.84 deducted from his salary as a penalty under the Taylor law

because of his participation in an illegal strike. He also seeks a determination that the Taylor law (New York Civil Service Law §210) is unconstitutional in permitting a deduction from wages without prior hearing.

The summons and complaint was served on an assistant bookkeeper of the Board of Education by a Deputy United States Marshal.

The complaint is 30 pages long with much more argument than facts. Plaintiff alleges that he took part in a four-day work stoppage on September 6, 7, 8 and 11, 1972.

He was notified on September 27, 1972 by the Superintendent of Schools that the Superintendent had determined that his absence constituted participation in a strike, in violation of Section 210(2)(h) of the Civil Service Law, but that he might file an affidavit within twenty days setting forth any facts relied on to show this determination was not correct. Plaintiff responded by a letter which asked for a hearing but did not state any reason for his absence from work. The Acting Superintendent thereafter informed him that the affidavit failed to establish that his absence was not in violation of the Taylor law and that therefore his objection was denied. On his October pay check a deduction was made for the four days in which he had not been performing his duties, a deduction which is not disputed. The November and December pay checks deducted also the amount paid for four additional days as a penalty under the Taylor law. Plaintiff's attack is based primarily on an alleged lack of procedural due process and lack

of an impartial hearing before the deduction from wages, which plaintiff considers to be a garnishment of wages. *Sniadach v. Family Finance Corp.* 395 U.S. 337, 89 S.Ct. 1820 (1969). He asserts also that the Board of Education could not provide him an impartial decision because all its members had a pecuniary interest in the decision. *Gibson v. Berryhill*, 411 U.S. 564, 93 S.Ct. 1689 (1973) and *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S.Ct. 80 (1972). The alleged pecuniary interest is said to result from the fact that the Superintendent of Schools and all his assistants and advisors have a responsibility to balance the school budget, to determine expenditures, and to seek sources of revenue, and therefore they cannot act in a detached manner in determining the guilt or innocence of affected employees.

Discussion

1. The service of process conforms substantially with Rule 4(d)(3) of the Federal Rules of Civil Procedure. Since the summons and complaint reached the responsible officials, the Court will not require re-service.

2. The claim of jurisdiction over the Board of Education under 42 U.S.C. §1983 raises difficult questions. Since the decision of the Supreme Court in *City of Kenosha v. Bruno*, 412 U.S. 507, 93 S.Ct. 222 (1973), a number of courts have decided that a school board is not a "person" under §1983. *Patton v. Conrad Area School District*, 388 F. Supp. 410 (D. Del. 1975); *Seaman v. Spring Lake Park Independent School District*, 387 F. Supp. 1168 (D. Minn. 1974); *Weathers v. West Yuma County*

School District, 387 F. Supp. 552 (D. Colo. 1974); *Howell v. Winn Parish School Board*, 377 F. Supp. 816 (W.D. La. 1974).

This circuit has not dealt directly with the issue. *Newman v. Board of Education*, 508 F.2d 277 (2d Cir.), *cert. denied*, _____ U.S. _____, 95 S.Ct. 1447 (1975); *Lombard v. Board of Education*, 502 F.2d 631 (2d Cir. 1974), *cert. denied*, _____ U.S. _____, 95 S.Ct. 1400 (1975); *Vega v. Civil Service Commission*, 385 F. Supp. 1376 (S.D.N.Y. 1974).

Lack of jurisdiction under §1983 cannot be cured in this case by 28 U.S.C. §1331, since the necessary $10,000 jurisdictional amount for federal question jurisdiction does not exist.

3. The complaint is not in conformity with F.R.Civ.P. 8(a)(2), which requires "a short and plain statement of the claim". In the absence of objection by the defendant on that ground and in the interest of expedition and economy, this court will nevertheless proceed to the merits.

4. Even if the deduction is treated as a garnishment, it does not constitute a violation of the *Sniadach* rule if plaintiff was entitled to a judicial hearing before a deduction. The purpose of a hearing, moreover, is not just to listen to people talk but to decide issues of fact or law. In this case there is no dispute of the fact that plaintiff engaged in an unauthorized strike. His own complaint states on page 5 that there was a work stoppage at the Plainview-Old Beth Page School District on September 6, 7, 8 and 11, 1972 and it does not deny that he took part in it, as set forth in the notice to him from the

Superintendent of Schools. No attack appears to be made on the right of the state to impose a penalty on a teacher who engages in an unauthorized strike.

Plaintiff's failure to dispute his participation in the strike is not excused by the fact that he believed that the Board of Education could not give him an impartial hearing. In the first place, his case is not supported by the cases he cites. There is no indication that any school official had a personal pecuniary interest which would be affected by whether plaintiff's absence from work was authorized or excusable, as was the case in *Gibson v. Berryhill*, 411 U.S. 564, 93 S.Ct. 1689 (1973). In the second place, the provision for judicial review of any administrative decision under Article 78 of the New York Civil Practice Law and Rules would permit determination of this point. Plaintiff was offered the right to proceed under Article 78 and did not do so. A bargaining unit for the teachers filed a 78 proceeding, which was unsuccessful and which has not been appealed. There is no indication in the record that the deduction from plaintiff's salary would have been made prior to a determination in an Article 78 proceeding if he had used that procedure.

Being supported by an affidavit, defendant's motion should be treated as one for summary judgment. F.R.Civ.P. 12(b)(6). Since there are no material issues of disputed fact, the motion should be granted.

It is ORDERED that defendant's motion to dismiss the complaint be granted and that the Clerk of the Court enter judgment dismissing the complaint.

ORRIN G. JUDD
U. S. D. J.